SARIPAH MANAP & ORS

v.

EMAR SDN BHD & ORS

HIGH COURT MALAYA, MELAKA
SURIYADI HALIM OMAR J
[CIVIL SUIT NO: 22-17-1995]
16 JULY 1997

COMPANY LAW: *Accounts - Request for - Companies Act 1965, s. 190 - Debenture - Receivership - Appointment of receiver and manager - Duties of receiver and manager*

CIVIL PROCEDURE: *Accounts - Action for - Rules of the High Court 1980, O. 43 r. 1 - Principal and agent - Action - Dismissal of action - Striking out - Rules of the High Court 1980, O. 18 r. 19 & O. 33 r. 2 - Appeal - Appeal from Registrar - Rules of the High Court 1980, O. 56 r. 1 - Receiver and manager - Appointment*

CONTRACT: *Agency - Principal and agent - Duty to render proper accounts - Receiver as agent of company - Contracts Act 1950, s. 166*

The 1st and 2nd plaintiffs were directors of one EMAR Sdn Bhd, the 3rd plaintiff ('the company') which was involved in a housing development project. The company obtained financial assistance from one Perwira Habib Bank Bhd ('the bank') and the loan was secured by a debenture over the assets of the company. Due to financial problems, the defendants were appointed as receivers and managers for the company.

The plaintiffs wrote to the bank to find out the current position of the company's accounts but received no response. The plaintiffs then initiated the present action, praying *inter alia* that moneys received by the defendants as agents of the company be paid to them and that accounts be supplied to the plaintiffs.

The plaintiffs' counsel argued that s. 166 of the Contracts Act 1950 ('the CA') provides that an agent is bound to render proper accounts to his principal on demand. As the receivers were the agents of the company, they had to comply with the plaintiffs' request. The defendants argued that their responsibility in respect of the request by the plaintiffs was only limited to the documents already handed to the Registrar of Companies as required under s. 190 of the Companies Act 1965 ('the Act').

The defendants filed an application to strike out the plaintiffs' writ of summons pursuant to O. 18 r. 19 of the Rules of the High Court 1980 ('the RHC') and this was allowed by the Senior Assistant Registrar ('the SAR'). The present case was an appeal against the decision of the SAR. The two main issues before the court were :

i) The ownership of the documents requested; and

ii) Whether the defendants could refuse to hand over the requested documents?

Held:

[1] This appeal was made pursuant to O. 56 r. 1 of the RHC whereby an appeal shall lie to a judge in chambers from any judgment, order or decision of the Registrar. The appeal was therefore an actual rehearing and the court should treat it as if it was hearing it for the first time. The judge should not be fettered or shackled by the views of the SAR.

[2] A summary procedure under O. 18 r. 19(1)(a) & (b) of the RHC should only be adopted when it is conspicuously clear that the claim on the face of it is obviously unsustainable. If it can be shown that the pleadings do disclose some cause of action or has raised some questions fit to be decided, however slight the chances are of succeeding, that case should not be struck off. Otherwise it should be set down for argument as required under O. 33 r. 2 of the RHC.

[3] A receiver and manager is normally constituted as the agent of the company before liquidation. Nevertheless, due to the complex position created by the debenture, the primary duty of the receiver is to the debenture holders and not the company. His actions must be based on good faith as to act otherwise may even render him liable for a suit under negligence.

[4] The documents requested for by the plaintiffs, namely the working papers to the bank, the profit and loss statement and balance sheet of the company for the last three years together with all the notes to the accounts, were the property of the company. No extra effort was required to prepare these documents nor do they in any way impede the receiver in his duties toward the debenture holders. By so supplying these documents, not only would assistance be rendered to the plaintiffs in the fulfillment of their statutory duties, but it would also be in tandem with the obligations of the receivers as provided under s. 166 of the CA. These documents were highly essential for the plaintiffs' peace of mind and hence they were justified in requesting for them.

[5] There is nothing in s. 190 of the Act to indicate that documents ought not to be supplied to the plaintiffs even if the request was over and above those statutory accounts supplied to the Registrar of Companies.

[Order of SAR set aside with costs.]

[Writ and the amended statement of claim ordered to be set down for trial.]

Cases referred to:

Evans v. Bartlam [1937] 2 All ER 646 ***(refd)***

Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241

Majlis Perbandaran Melaka Bandaraya Bersejarah v. Chin Nyok Lin & Ors [1996] 2 AMR 2138 ***(refd)***

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1994] 4 CLJ 57 ***(refd)***

Jamir Hassan v. Kang Min [1991] 3 CLJ 2490

Tengku Ali Ibni Almarhum Sultan Ismail v. Kerajaan Negeri Terengganu Darul Iman [1994] 2 MLJ 83

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***

Zakaria bin Mohamed Esa v. Dato Abdul Aziz bin Ahmad & Ors [1985] 2 MLJ 222 ***(cit)***

Peck v. Russel [1923] 4 FMSLR 32 ***(cit)***

Standard Chartered Bank Ltd. v. Walker And Another [1982] 3 All ER 938 ***(refd)***

Smiths Ltd. v. Middleton [1979] 3 All ER 842 ***(refd)***

Oh Thevesa v. Sia Hok Chai [1992] 1 CLJ 170 ***(cit)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 007 ***(cit)***

United Malayan Banking Corporation Bhd v. Official Receiver and Liquidator Of Soon Hup Seng Sdn Bhd (In Liquidation) & Anor [1986] 1 MLJ 75 ***(cit)***

Gosling v. Gaskell & Grocott [1897] AC 575 ***(cit)***

Re B Johnson & Company (Builders) Ltd [1955] 1 CH 634 ***(cit)***

American Express International Banking Corp v. Hurley [1985] 3 All ER 564 ***(cit)***

Official Receiver v. Chi Man Kwong [1994] 1 SLR 809 ***(cit)***

Gomba Holdings UK Ltd and Others v. Homan and Anor [1986] 3 All ER 94 ***(refd)***

Gomba Holdings UK Ltd and Others v. Minories Finance Ltd and Ors [1989] 1 All ER 261 ***(refd)***

Newhart Developments Ltd v. Co-Operative Commercial Bank Ltd [1978] 1 QB 814 ***(refd)***

Tan Ah Teck v. Coffral (M) Sdn Bhd [1991] 3 CLJ 2227 ***(refd)***

Smiths Ltd v. Middleton [1979] 3 All ER 842 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 167, 168, 169, 190

Contracts Act 1950, s. 166

Rules of the High Court 1980, O. 18 r. 19, (1)(a), (b), O. 33 r. 2, O. 43 r. 1, O. 56 r. 1

Other sources referred to:
Company Receivers and Managers, O'Donovan, 2nd edn, p. 2823
Halsburys Laws Of England, 4th edn, para. 938

For the plaintiffs - CC Aiyathurai; M/s CC Aiyathurai & Co
For the defendants - Vinayaga Raj Rajaratnam; M/s Skrine & Co

JUDGMENT

Suriyadi Halim Omar J:

The 1st and the 2nd plaintiffs are the current directors of EMAR Sdn. Bhd., the 3rd plaintiff. The 3rd plaintiff which is involved in the development of a housing estate known as Taman Maju Jasin had obtained financial assistance from Perwira Habib Bank Berhad. Securities in the form of debentures were also given. Due to some financial problems the defendants were appointed as receivers and managers on 15 June 1987, managing the business of the company from the date of their appointment (hereinafter referred collectively either as 'the defendants' or 'just the receiver' (singular)). The plaintiffs later wrote to the bank with the intention of finding out the current position of the company's account but unfortunately received no response. To cut the matter short, the plaintiffs initiated this litigation, praying *inter alia* that monies received by the defendants as agents of EMAR Sdn. Bhd. be paid to the latter and that accounts be supplied to the plaintiffs.

On 4 April 1997 the Senior Assistant Registrar heard Encl. 46, a summons-in-chambers application by the defendants for an order under O. 18 r. 19 of the Rules of the High Court 1980. The application strove to strike out the plaintiffs' writ of summons and amended statement of claim on the grounds that they:

a) disclosed no reasonable cause of action; and/or

b) are scandalous, frivolous and/or vexatious; and/or

c) an abuse of the process of the court.

Having heard the submissions of both parties the Senior Assistant Registrar allowed the application and struck off the writ of summons and the amended statement of claim. The plaintiffs have now come before me to appeal against that decision. This appeal has come by the conduit of O. 56 r. 1 whereby an appeal shall lie to a judge in Chambers from any judgment, order or decision of the Registrar. Since this decision emanated from the Senior Assistant Registrar, the appeal therefore is an actual rehearing and I have to treat it as if I am hearing it the first time. I will not be fettered or shackled by the views of the Registrar. As Lord Atkins in *Evans v. Bartlam* [1937] 2 All ER 646 at 648 said:

> I wish to state my conviction that, where there is a discretionary jurisdiction given to the court or a judge, the judge in Chambers is in no way fettered by the previous exercise of the master's discretion. His own discretion is intended by the rules to determine the parties' rights, and he is entitled to exercise it as though the matter came before him for the first time. He will, of course, give the weight it deserves to the previous decision of the master, but he is in no way bound by it.

(see also *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 CLJ 241; *Majlis Perbandaran Melaka Bandaraya Bersejarah v. Chin Nyok Lin, Pentadbir Harta Pesaka Loke Yoon Hing @ Loke Yoon Heng, Simati & 3 Ors.* [1996] 2 AMR 2138).

With that platform in mind I now proceed with the rehearing of Encls. 2 and 53. A first sight will show that aside from the file being thick, eventhough still at the early stages, the numbering of the enclosures are rather erratic and far apart. Had I not been privy to the history of this case I certainly would have been intimidated by these unusual factors. The records will show that my involvement began with the hearing of Encl. 18 on 19 March 1996 when the defendants prayed that the plaintiffs' action be dismissed with costs. At the end of the hearing I made the necessary orders. In the afternoon when I was about to proceed to hear another application ie, Encl. 3 which was the plaintiffs' application under O. 43 r. 1, both parties by consent agreed that Encl. 4 be converted as a statement of claim and the defendants be at liberty to file a defence within two weeks. By consent too the order I made in the morning pertaining to Encl. 18 was vacated.

It would appear from the records that the statement of claim had also gone through the process of reamendment with the defence having been filed. In the case of *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 the Supreme Court in crystalline terms said that as defendants had filed their unconditional appearance, they had thus deprived themselves of the right to invoke O. 18 r. 19. In fact a hearing date was also given ie, 2 June 1997 though vacated by virtue of the striking out application. After having gone through the rigmarole of repeated amendments and at such a late stage at that, the defendants now struck with a vengeance again by attempting to strike out this converted statement of claim *vide* Encl. 46. Eventhough a court has a discretion to allow the application at the close of pleadings, however it will probably refuse to exercise such discretion where the matter has already been set down for trial (*Jamir Hassan v. Kang Min* [1991] 3 CLJ 2490; *Tengku Ali Ibni Almarhum Sultan Ismail v. Kerajaan Negeri Terengganu Darul Iman* [1994] 2 MLJ 83). There was nothing to stop them from taking up another recourse ie, pursuant to O. 33 r. 2 of the Rules of the High Court. In the current case not only has unconditional appearance been filed but this application is also not an O. 33 r. 2 application.

As said above, the Senior Assistant Registrar initially heard it, and allowed the application. Being dissatisfied with the outcome the plaintiffs have now come before me. Midway during the hearing both parties indicated that this matter could be resolved by the court merely by deciding on certain relevant issues. Mr. Aiyathurai appeared to be quite content for purposes of deciding whether the application should be resolved to hinge merely on the spartan issue of whether the plaintiffs are entitled to the accounts as particularised in the writ. The defendants on the other hand indicated that they would be quite happy if the whole action could be resolved on the issue of whether the plaintiffs were entitled to accounts over and above those dictated under s. 190 of the Companies Act 1965. Regardless of the dissimilarities of the approach, both parties were in agreement that the whole issue in the writ hinged on accounts.

When the hearing of the appeal began the defendants launched a salvo alleging that the plaintiffs have no leg to stand as no affidavits in reply were filed. He relied on *Ng Hee Thoong & Anor. v. Public Bank Bhd.* [1995] 1 CLJ 609 to support his argument. The plaintiffs in return ventilated to the court that the wordings of O. 18 r. 19(1)(a) brook no requirement of affidavits in reply as the provision reads that "no evidence shall be admissible on an application under para. (1)(a)". I will not disagree with the plaintiffs on these points. Furthermore he canvassed that the facts elicited from the converted statement of claim were more than sufficient for the court's consideration (see *Zakaria bin Mohamed Esa v. Dato Abdul Aziz bin Ahmad & Ors.* [1985] 2 MLJ 222; *Peck v. Russel* [1923] 4 FMSLR 32).

On the point of law, after disposing the above issue Mr. Aiyathurai further contended that the fluidity and the uncertainty surrounding the law pertaining to the duties of the receiver especially in relation to s. 190 was sufficient ground for the application to be dismissed. This section reads:

> (1) Every receiver or manager of the property of a company or of the property within Malaysia of any other corporation shall:
>
> (a) within one month after the expiration of the period of six months from the date of his appointment and of every subsequent period of six months and within one month after he ceases to act as receiver or manager, lodge with the Registrar a detailed account in the prescribed form showing;
>
> (i) his receipts and his payments during each period of six months;
>
> (ii) the aggregate amount of those receipts and payments during all preceeding periods since his appointment; and

(iii) where he has been appointed pursuant to the powers contained in any instrument, the amount owing under that instrument at the time of his appointment, in the case of the first account.

I find the argument of Mr. Aiyathurai to be very attractive as enroute to my decision these following questions consistently troubled and nagged me, namely:

(a) what is the extent of the receiver's responsibility to the plaintiffs;

(b) what kind of information may the plaintiffs request for purposes of carrying out their residual duties as directors without facing rejection;

(c) must the plaintiffs merely apply to the Registrar of Companies for the relevant accounts instead of extricating them from the receiver (see *Standard Chartered Bank Ltd. v. Walker And Another* [1982] 3 All ER 938; *Smiths Ltd. v. Middleton* [1979] 3 All ER 842; *Halsburys Laws Of England*, 4th Edn., para. 938).

(d) what is the legal value of the accounts if obtained from the Registrar of Companies when the latter is not the maker of the document;

(e) even if these documents were public documents with the contents being acceptable in a court of law are the contents sufficient to cover the needs of the plaintiffs;

(f) why is s. 190 of the Companies Act the point of reference by the defendants when that provision is silent as to the level of responsibility or the relevant provision as regards the request of the plaintiffs;

(g) are the accounts requested over and above the accounts mentioned in s. 190 of the Companies Act; and

(h) even if the accounts requested for are over and above the accounts mentioned in s. 190 of the Companies Act, for purposes of this case, was the receiver right in refusing the plaintiffs' request?

In fact all these above issues are intertwined with legal questions that merit some serious consideration on my part. A summary procedure under O. 18 r. 19(1)(a) and (b) should only be adopted when it is conspicuously clear that the claim on the face of it is obviously unsustainable. If it can be shown that the pleadings do disclose some cause of action or has raised some questions fit to be decided, however slight the chances are of succeeding, that case should not be struck off. Otherwise it should be set down for argument as required under O. 33 r. 2 of the Rules of the High Court 1980 (see *Oh Thevesa v. Sia Hok Chai* [1992] 1 CLJ 170; *Bandar Builder Sdn. Bhd. & Ors. v. United Malayan Banking Corporation Bhd.* [1993] 4 CLJ 7).

The Request For The Accounts

The accounts requested for comes under O. 43 r. 1 and this rule reads:

> (1) Where a writ is indorsed with a claim for an account or a claim which necessarily involves taking an account, the plaintiff may, at any time after the defendant has entered an appearance or after the time limited for appearing, apply for an order under this rule.
>
> (2) An application under this rule must be made by summons and, if the court so directs, must be supported by affidavit or other evidence.
>
> (3) On the hearing of the application, the court may, unless satisfied by the defendant by affidavit or otherwise that there is some preliminary question to be tried, order that an account be taken and may also order that any amount certified on taking the account to be due to either party be paid to him within a time specified in the order.

The plaintiffs' counsel in support of his case began with s. 166 of the Contracts Act 1950 solely to press the point home that an agent is bound to render proper accounts to his principal on demand.

He canvassed that the receiver in this case is the agent of the company and as such must comply with the plaintiffs' request. This legal assertion holds true, as a receiver and manager is normally constituted as the agent of the company before liquidation (see *United Malayan Banking Corporation Bhd. v. Official Receiver And Liquidator Of Soon Hup Seng Sdn. Bhd. (In Liquidation) & Anor.* [1986] 1 MLJ 75, 78; *Gosling v. Gaskell & Grocott* [1897] AC 575). Eventhough that is true, nevertheless due to his complex position created by the debenture, the primary duty of the receiver is to the debenture holders and not the company (*Re B Johnson & Company (Builders) Ltd.* [1955] 1 CH 634). His actions must be based on good faith as to act otherwise may even render him liable for a suit under negligence (see *American Express International Banking Corp v. Hurley* [1985] 3 All ER 564 and *Official Receiver v. Chi Man Kwong* [1994] 1 SLR 809).

The defendants have been harping before me that their responsibility to the request to the plaintiffs is only limited to the documents already handed to the Registrar of companies as required under s. 190. The defendants have interpreted the law that way regardless of the agency capacity and regardless of the fact that the receiver is in possession of the plaintiffs' property. The issue of the ownership of the property plays a very important role in their submission, and the case heavily relied on is that of *Gomba Holdings UK Ltd. And Others v. Homan And Another* [1986] 3 All ER 94. It would appear that the defendants have interpreted the attitude of Hoffmann J to be that the law imposes no duty on a receiver of a company to provide any account to the

company over and above that already given to the Registrar of Companies. In *Gomba Holdings UK Ltd. And Others v. Minories Finance Ltd. And Others* [1989] 1 All ER 261 and as regards the issue of ownership Fox LJ said:

> ... what are the records of the companies, ie whether a document belongs to the companies or someone else.
>
> The receivers in the present case plainly had a duty to manage the affairs of the companies. All documents which were created or received in pursuance of that duty must be the property of the companies ...
>
> The receivers had to advise and inform the debenture holders regarding the conduct of the receivership. Documents created for that purpose, while they can certainly be said to relate to the affairs of the companies, cannot be the property of the companies. They were not brought into being for the purpose of the companies' business or affairs ...
>
> Thirdly, there are documents prepared by, or on behalf of, the receivers not in pursuance of any duty to prepare them but simply to enable the receivers to prepare such documents or perform such duties as they were required to prepare or perform for the purposes of their professional duties to the debenture holders or the companies. Such papers are, I think, the property of the receivers.

I am persuaded by the logic of the above reasoning as regards ownership. For easy reference I now reproduce the letter.

> c/o No 15 Jalan AU 3/14
> Ampang UIu Klang
> 54200 Selangor Darul Ehsan
>
> 13 May 1993
>
> The Manager
> M/s Coopers & Lybrand
> 165A & 167A Jalan Munshi Abdullah
> 75100 Melaka
>
> Dear Sir
>
> **RF: EMAR SDN BHD**
>
> The above is the company which developed Taman Maju in Jasin, Melaka and subsequently placed under your receivership and management, and we are the present directors of the company.
>
> We have been given to understand that you are in possession of a copy of the working paper that was presented to Perwira Habib Bank Malaysia Berhad in late 1986 in support of the company's application for standby overdraft and bank guarantee facilities. Based on the working paper, a standby overdraft of RM450,000 and a banker's guarantee of RM1.7 million were granted by the

Bank on or about 22/1/1987, following which the first debenture was signed by the company favouring the Bank.

Further to the above, we believe it is part and parcel of your duties as Receivers & Managers to prepare the accounts and financial statements of Emar Sdn Bhd. And as the Company Managers, you are under obligation to supply the Company as represented by its Directors a copy each of its Profit and Loss Statement and Balance Sheet on annual basis. We regret that this has not been done for many years.

We would therefore be pleased if you could now forward to us the following:

a) a copy of the said working paper to the Bank, together with all attachments thereto; and

b) a certified true copy each of the Profit and Loss Statement and Balance Sheet of Emar Sdn. Bhd. for the last three years, together with all the notes to the accounts.

As we require the above urgently, we would appreciate if you could forward them to us within 10 days from the date of this letter.

We sincerely hope we do not have to resort to legal means to obtain those documents.

Thank you

Yours sincerly,

Perusing the 1st set of documents which were requested, it is undeniable that they were prepared by the company in 1986 and later sent to Perwira Habib Bank Berhad for purposes of the affairs of the company created for the debenture holders. At that material time the receiver was not even in the picture yet and as such I rule them to be the property of the company. Similarly the 2nd set of documents relate to affairs of the company which is no concern of the debenture holder. They cannot also be construed as documents prepared and owned by the receiver for purposes of enforcing the rights of the debentures. On this premise these documents too are identifiable to be the property of the company. At this stage the standard of proof is not of balance of probability but whether it is triable that the documents are owned by the company. If I may add further, no extra effort is required to prepare these documents and certainly do not in any way impede the duties of the receiver in his duties towards the debenture holders. In fact by so supplying these documents, not only assistance is rendered to the plaintiffs in the fulfilment of their statutory duties, but also in tandem with the obligations of the receiver as provided under s. 166 of the Contracts Act. At the earlier stage,

the directors had already indicated the purpose of wanting the accounts ie to ensure that their residual duties could be carried out as provided comprehensively by ss. 167, 168 and 169 of the Companies Act. Any default on their part will attract some form of prosecution, and if found guilty, may be liable to imprisonment up to six months or fine of RM5,000 or both. These documents therefore are highly essential, if not imperative, for the plaintiffs' peace of mind and duties and hence justified in requesting for them.

At any rate if the defendant is not in possession of all these documents, he need only to say so, instead of playing a legal hide and seek game with the plaintiffs and in the process creating problems all around.

The next relevant question is, can the defendants refuse to hand over the requested documents which I already have ruled to be the property of the company? To answer this question, I propose to have a sojourn of legal cases, simultaneously being conscious and alert of the complex separate and distinct duties of the directors and the receiver.

In the case of *Newhart Developments Ltd. v. Co-Operative Commercial Bank Ltd.* [1978] 1 QB 814 where the court discussed the issues of debentures, receivers and the authority of directors, Shore LJ at p. 819 para. E said:

> But the provisions in the debenture trust deed giving him that power is an enabling provision ... **It does not divest the directors of the company of their power, as the governing body of the company,** of instituting proceedings in a situation where so doing does not in any way impinge prejudicially upon the position of the debenture holders by threatening or imperilling the assets which are subject to the charge.

Wan Yahya J in *Tan Ah Teck (t/a Plumcon Plumbing & Construction Co) v. Coffral (Malaysia) Sdn. Bhd.* [1992] 1 MLJ 553 at p. 558 as regards the same issue said:

> The appointment of a debenture holder receiver even with authority to act as agent of the company does not operate to terminate the director's control of service with the company unless such appointment of receiver is inconsistent with the continued employment of a managing director – see *Griffiths v. Secretary of State for Social Services.* In *Newhart Developments Ltd. v. Co-operative Commercial Banks Ltd.* it was held that a provision in a debenture empowering the receiver to bring an action in the name of the company whose assets were charged was merely an enabling provision, investing the receiver with the capacity to bring such an action, and did not divest the company's directors of their power ... provided that the proceedings did not interfere with the receiver's function of getting in the company's assets or prejudicially affect the debenture holder by imperilling the assets.

In *Smiths Ltd. v. Middleton* [1979] 3 All ER 842 at p. 847 Blackett-Ord V-C His Lordship said:

> During the receivership, the keeping of accounts obviously requires co-operation between the company and the receiver, because although the **directors** are still, I think, liable technically under s. 147 of the 1948 Act and its successor, clearly they **may have to get the necessary information from the receiver.** (emphasis supplied)

O' Donovan Company Receivers And Managers, 2nd Edn. at p. 2823 succinctly said ... "Although the board's powers are truncated by the appointment of a receiver and manager the directors are not exempted from their statutory obligations while the company is in receivership. They are often, therefore, in an invidious position since they might not be able to obtain ready access to the company's books and financial statements so as to be able to perform their duties.

The defendants have submitted that so long as they have supplied the plaintiffs with the documents earlier transmitted to the Registrar of Companies they would thus have complied with the plaintiffs' request. The plaintiffs have asserted otherwise. It is a fact that a company is paralysed by the presence of a receiver, with complete control of all the important documents and unless there is cooperation, the plaintiffs will be put in an unpleasant position. Here for certain cooperation is lacking.

The defendants have resorted to the case of *Gomba Holdings UK Ltd. and Others v. Homan And Another* [1986 G. No. 1288] 1 WLR 1301 to deny the request of the plaintiffs to support their assertion that no duty is owed to the plaintiffs except to supply the documents which they had sent earlier to the Registrar of Companies pursuant to their statutory duties. This argument must also mean that the defendants' lack of duties extend even to the documents which I already have ruled to be the property of the company. The usage and interpretation of *Gomba's* case per the judgment of Hoffmann J by the defendants has perplexed me as after having scrutinised the case comprehensively I have grave doubts that this case supports the latter's contention.

To substantiate my stance I begin by deciphering s. 190 of the Companies Act. Having gone through it I found nothing which indicates that the amount of information to be supplied to the plaintiffs is only in so much of that already given to the Registrar of Companies. Similarly there is nothing provided under this section to say that by virtue of these accounts having been sent to the Registrar of Companies, and in the event documents are requested, the defendants may reject that request on the basis that that responsibility

towards the plaintiffs has been exhausted. As to whether Hoffmann J has dealt with this matter the answer is in the negative as he has left the matter still wide open. In his refusal to agree to any suggestion that the documents given to the Registrar of Companies are about all that the plaintiffs can ask for, Hoffmann J at p. 99 para. e-f said:

> During the receivership, the company's right to information beyond the statutory accounts must in my judgment depend on demonstrating a 'need to know' for the purpose of enabling the board to exercise its residual rights or perform its duties. I do not want to explore the question of what this might entail further than is necessary for the purpose of this case.

Eventhough His Lordship has said that he did not wish to explore the all imperative question of whether the company is entitled to information which is beyond the statutory accounts, his remarks have hinted a path by which I may capitalise and be guided by. At p. 97 para. g the judge said:

> Section 498 imposes no duty on a receiver of a company's property appointed under a fixed charge to provide any account to the company and **it seems unlikely that the obligation to send accounts to the registrar of companies was intended to supplant the receiver's accountability to the mortgagor.** (emphasis supplied)

Further down at para. j he made a rather interesting observation when he did not discount the duties of the receiver under the doctrine of equity. He opined:

> This provision in my judgment is intended to leave unaffected any obligation on a receiver to account or provide information which may exist in **equity or by contract.**

At p. 98 para. b he accentuated the above observation by saying:

> I have already indicated that for the purpose of determining the extent of a receiver's equitable obligation to provide accounts and information to the company, his status as agent provides a starting point for the inquiry rather than its solution.

Aside from the above observations, Hoffmann J has also not discounted the instance when the directors "may need information from the receivers in order to comply with its statutory obligation to render accounts." (p. 99 para. f). Confirmable with the principles he enunciated, he viewed that the receiver's duty to provide such information must be subordinated to his primary duty not to do anything which may prejudice the interest of the debenture holder.

To add to this point I would like to highlight the view of Blackett-Ord V-C where at p. 847 para. e of *Smiths Ltd. v. Middleton (supra)* he candidly said:

> I appreciate he is not managing the business strictly for the company, but he is the receiver of the property of the company, and the practicalities are that he is largely running the company on the directors' behalf, and it may, not necessarily will, be practically impossible for the directors to keep within their technical obligations without his assistance. He has a statutory obligation to produce these yearly abstracts of receipts and payments, and these in a long receivership can be complementary to the annual accounts of a company. *But the documents required under s. 372 are only abstracts, and that must mean, I think, that there are fuller accounts in the background. There would be accounts which the receiver, as the company's agent, is bound to keep and to produce to the company when required.* (emphasis supplied).

Having perused the documents requested for by the plaintiffs I found for a fact that:

1) the 1st set of documents requested are the property of the company which were prepared before the coming of the receiver;

2) the 2nd set of documents may also be documents which are owned by the company. I have deliberately used the word "may" as at this stage there is no legal requirement that the document on a balance of probability is owned by the company. For purposes of this application it is sufficient if the factor of ownership is disputable. If the 2nd set of documents do not exist the receiver need only to say so and the matter will end there;

3) the supply of these documents will in no way prejudice the interest of the debenture holders;

4) these documents are required by the plaintiffs in order to comply with their statutory obligation to render accounts;

5) the act of supplying the documents is certainly within the provision of s. 166 of the Contracts Act, and within the purview of the equitable duties and contractual obligations of the receiver as agents; and

6) there is nothing in s. 190 to indicate that documents ought not to be supplied to the plaintiffs even if the request is over and above those statutory accounts supplied to the Registrar of Companies.

I have gone into some detail on the issue and may even have encroached into the merits of the statement of claim, but due to the peculiar nature of this case this course of action is necessary. The defendants have consistently stressed the point that however difficult the case may appear, but if unsustainable should be struck off with impunity. I am in total agreement with this salutary principle but having perused the unusual primary facts, meshed

with legal niceties (facts which I must assume to be true), this principle certainly does not apply in this application. I find that this is not one of those hopeless or unsustainable cases but rather the opposite and consequently have no hesitation in setting aside the order of the Senior Assistant Registrar with costs. I therefore order that the writ and the amended statement of claim be set down for trial.

Reported by Ling Hea Hoon